

D7GPKRIC (3905)

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x
4 J. KRISS, ET AL.,

5 Plaintiffs,
6 v. 13 CV 3905 (LGS)

7 BAYROCK GROUP, LLC, ET AL.,

8 Defendants.
9 -----x

10 New York, N.Y.
11 July 16, 2013
12 10:52 a.m.

13 Before:

14 HON. LORNA G. SCHOFIELD,

15 District Judge

16 APPEARANCES

17 MUNDIE LAW FIRM

18 Attorneys for Plaintiffs

19 BY: FREDERICK M. OBERLANDER, ESQ.
and

20 THE LAW OFFICE OF RICHARD E. LERNER, P.C.

21 BY: RICHARD E. LERNER, ESQ.

22 BEYS, STEIN & MOBARGHA, LLP

23 Attorneys for Defendant Felix Sater

24 BY: JOSHUA D. LISTON, ESQ.

25 NADER MOBARGHA, ESQ.

26 SATTERLEE, STEPHENS, BURKE & BURKE, LLP

27 Attorneys for Defendants in 2010 case, BayRock LLC,
28 BayRock Spring Street LLC, BayRock Whitestone LLC, BayRock
29 Camelback LLC, and BayRock Merrimac LLC

30 BY: WALTER A. SAURACK, ESQ.

31 ZOE E. JASPER, ESQ.

32 MORGAN, LEWIS AND BOCKIUS, for Morgan, Lewis and Bockius and
33 Kelly Moore

34 Appear as Friend of the Court

35 BY: JOHN T. ROVER, ESQ.

36 ALSTON AND BIRD, for National Union Fire Insurance Co. of
37 Pittsburgh, Pennsylvania

38 Appear as Friend of the Court

39 BY: ALEXANDER S. LORENZO, ESQ.

D7GPKRIC (3905)

1 (In open court)

2 (Case called)

3 MR. OBERLANDER: Frederick Oberlander for all
4 plaintiffs.5 MR. LERNER: Co-counsel, Richard E. Lerner for
6 plaintiffs.

7 THE COURT: Good morning.

8 MR. LISTON: Good morning, your Honor. Joshua Liston
9 for defendant, Felix Sater.10 MR. MOBARGHA: Nader Mobargha for defendant, Felix
11 Sater.12 THE COURT: Good morning. Okay. Let me have just a
13 minute to get set up, but I'll also start out with a few ground
14 rules. The first thing is, we are in open court here, and I
15 don't know if necessarily there are any strangers to these
16 actions here, but I would ask counsel to refrain from
17 disclosing any privileged or sealed or otherwise confidential
18 information in their remarks to the Court. I don't think that
19 that will be necessary. If for some reason you think it is,
20 please let me know so that we can handle it appropriately.21 Second, please stand to speak, and do not interrupt
22 each other, and do not stand while someone else is speaking.
23 And when someone else is done speaking, please wait until
24 you're called on to speak.

25 I don't know exactly who's in the courtroom and on

D7GPKRIC (3905)

1 behalf of what parties, but as you know, there are three
2 related actions that are on for this time. I know counsel have
3 not appeared in some actions, but I invite you to participate
4 as friends of the Court. And I invite you to sit at counsel
5 table as friends of the Court, if you have a client who is
6 named in any action.

7 I also would like counsel, and I can't order you but I
8 will invite you, I will ask counsel to stay for any proceeding
9 in which your client is named as a party and will handle all
10 three proceedings here.

11 There are a couple more things I wanted to mention. I
12 have individual rules and procedures. I understand
13 Mr. Oberlander had wanted to bring a computer into court.
14 That, unfortunately, still requires a lot of bureaucratic
15 maneuvering here in the courthouse. If you look at my rules
16 and procedures, you will see you have to apply ten days in
17 advance. It's not just to be a burden. It's because it takes
18 them ten days to approve it. So I urge all counsel to take a
19 look at my individual rules.

20 One of the things my individual rules say is if you
21 want to communicate with the Court, the way to do that is with
22 a letter attached to an e-mail to my chamber's e-mail account,
23 attached in a PDF format. And there should be nothing of
24 substance in the covering e-mail. It should all be in the
25 letter. There are page limits on letters, depending on what

D7GPKRIC(3905)

1 the nature of the letter is.

2 I know that people are anxious to communicate many
3 thoughts to the Court, but I ask you to adhere to the page
4 limits. Also, I beg you please to stick to a 12-point font
5 because I literally cannot read things if they get too small.
6 So 12-point font with at least single spacing, full single
7 spacing, at least one inch margins; so that I can read it. No
8 italics, please, unless the Blue Book or Strunk and White say
9 you can put things in italics. No shading, please. It makes
10 it more difficult to read everything once it's printed it out,
11 and I do want the benefit of your thoughts. So thank you for
12 that.

13 So give me one second here to get this on. Okay. So
14 I decided to take these matters out of order, not necessarily
15 arbitrarily, but I thought perhaps in the order starting with
16 the easiest first. I notice there is some counsel who have
17 just come to counsel table; so if I could just know who you are
18 and note your appearances, and the court reporter will do that
19 as well.

20 MR. ROVER: Thank you, your Honor. My name is John T.
21 Rover. I'm with Morgan, Lewis and Bockius, and I'm happy to
22 appear as a friend of the Court.

23 THE COURT: And who is your client?

24 MR. ROVER: Morgan, Lewis and Bockius, the law firm.

25 THE COURT: Oh, Morgan, Lewis.

D7GPKRIC (3905)

1 MR. ROVER: Yes. And I am a litigation partner in
2 Morgan, Lewis.

3 THE COURT: I'm trying to find you on this long list.
4 Okay. And tell me your name one more time.

5 MR. ROVER: John T. Rover, R-o-v-e-r.

6 THE COURT: Thank you and welcome, Mr. Rover.

7 MR. ROVER: Thank you. Also representing Kelly Moore.

8 THE COURT: Okay.

9 MR. ROVER: We have not been served.

10 THE COURT: Okay. I have that. Thank you very much.

11 MR. ROVER: Thank you.

12 MR. LORENZO: Good morning, your Honor. Alex Lorenzo
13 from Alston and Bird. Alston and Bird represents National
14 Union Fire Insurance Co. of Pittsburgh, Pennsylvania. We also
15 have not been served, and just to be clear, your Honor, this is
16 not an official appearance. We are neither waiving service nor
17 any jurisdiction.

18 THE COURT: I understand that. I appreciate your
19 being here. Would you tell me your name one more time.

20 MR. LORENZO: Sure. Alex Lorenzo, and the law firm is
21 Alston and Bird.

22 THE COURT: Thank you very much. And it's not
23 necessary for any other counsel to reserve your rights. None
24 of us will impute this as an appearance for purposes of this
25 action, and I assume you're here all as friends of the Court,

D7GPKRIC (3905)

1 if you haven't been served.

2 MR. SAURACK: Walter Saurack, on behalf of BayRock
3 LLC, BayRock Spring Street LLC, BayRock Whitestone LLC, BayRock
4 Camelback LLC, and BayRock Merrimac LLC, appearing on the 2010
5 action, per your Honor's order, and appearing as a friend of
6 the Court with respect to other matters.

7 THE COURT: Okay. Thank you. And would you mind
8 telling me your name again?

9 MR. SAURACK: It's Walter Saurack, S-a-u-r-a-k, and I
10 also have my colleague, Zoe Jasper, also from my firm of
11 Satterlee, Stephens, Burke & Burke.

12 THE COURT: Good morning. Thank you for appearing.

13 MS. JASPER: Good morning, your Honor.

14 THE COURT: Okay. I think that takes care of all of
15 us that are here. So with respect now to the action, which is
16 Kriss versus BayRock, 13 CV 3905, I understand that the
17 procedural posture of this case, I understand that this case
18 was removed from state court. But my first question, which is
19 typically my first question to counsel in any case, is, what is
20 this case about?

21 So, Mr. Oberlander, if you could just tell me briefly
22 what this case is about, I would appreciate that

23 MR. OBERLANDER: All right. The case is about the
24 alleged liability of persons who collaborated together in
25 sufficient form that they're vicariously liable whether, under

D7GPKRIC (3905)

1 state law it's called civil conspiracy or some other legal
2 theory of vicarious liability. It was brought under state law,
3 and the basis of liability is the collusion to commit fraud,
4 misrepresentation or wrongful concealment on various third
5 parties.

6 The particular material fact common to all such
7 concealments is the existence but wrongful concealment of the
8 conviction of Mr. Sater in connections with offerings and other
9 transactions where substantive law required the affirmative
10 disclosure. It was brought in state court because the primary
11 persons responsible are professional firms, mostly law firms
12 but one accounting firm, that are licensed by the State, and
13 without regard to whether they could or couldn't be
14 supplemental claims if the case stayed here.

15 Nevertheless, the State courts are uniquely well
16 suited to handle civil litigation concerning the alleged
17 misconduct of their licensed professionals. So essentially
18 that's it. The case is about those people.

19 If I had to pick one thing, if you gave me one
20 paragraph of a hundred words to sum it up, it's essentially
21 related around common law 487 fraud in and out of litigation as
22 to professionals who knew what the truth was and colluded to
23 hide it to support what their clients were to doing, which was
24 to commit fraud.

25 The only other important fact that I mention is it is

D7GPKRIC(3905)

1 a derivative action in State court, and I assume it will still
2 be one here, in that Mr. Kriss and Mr. Ejekam are claiming to
3 derivatively represent those equity owning members of certain
4 BayRock companies, the companies themselves derivatively, and
5 moreover, as creditors of those companies, along with the
6 Gottdiener plaintiffs, who are also creditors by reason of tort
7 claims against them under New York law.

8 They allege that some or all of the BayRock entities
9 are in insolvent and, therefore, they have under the trust fund
10 doctrine, the equivalent derivative standing. Therefore, it's
11 essentially not Jodi Kriss suing for harm to him. It's Jodi
12 Kriss acting on behalf of, and the Gottdiener or their estates
13 and others acting on behalf of the entities that they speak for
14 to vindicate the rights of all the constituents, meaning in
15 this case all the persons with claims, all the creditors, all
16 the defrauded banks and so on.

17 THE COURT: Okay. Thanks so much. That's helpful.
18 One other question, just to put this in context for me. You
19 said the defendants are primarily licensed professionals, but
20 if I'm correct, it looked to me like the defendants are very
21 much the same as the defendants in the 2010 action, and that
22 there are many types of parties, not just professionals.

23 MR. OBERLANDER: Understood. And if you're asking,
24 the explanation is that, as a matter of style over the years in
25 doing corporate litigation like this, it has tended to always

D7GPKRIC (3905)

1 come up somebody tends to object that there's a failure to join
2 a party, who may be indispensable or necessary. And the
3 reality is, I didn't want to run the risk of basically suing a
4 law firm saying you helped that person do this and the law firm
5 saying, well, you can't sue me if you don't join my claim.

6 I'm oversimplifying, but because it's derivative, if
7 those complex rules apply under 160, this is a complex case.
8 I'm doing the best I can to simplify.

9 THE COURT: No, no, no. I appreciate it.

10 MR. OBERLANDER: One last comment and I promise to
11 shut up.

12 THE COURT: No, that's okay.

13 MR. OBERLANDER: What precipitated the case was the
14 termination of proceedings in front of Judge Glasser to unseal
15 things resulted in various revelations of documents that all
16 got unsealed on or about the last week of March. March 22 is
17 the latest date. That's what precipitated the action in state
18 court. There would have been no such action without the
19 revelations that it's based on. All right? So if you're
20 asking why did it show up now and why wasn't it brought in in
21 2010, nobody knew any of that until March 2013.

22 THE COURT: Okay. So I guess my next question is a
23 related one. How is it different from the 2010 action, and why
24 shouldn't it just be merged with the 2010 action?

25 MR. OBERLANDER: If you're asking me straight out, as

D7GPKRIC (3905)

1 an officer of the court, whether the claims I intend to bring
2 would very likely be considered supplemental if it stayed here
3 on removal, the answer is yes, of course. It would be silly to
4 argue otherwise. And if you're asking me, therefore, if
5 they're supplemental, couldn't everything be merged?
6 Absolutely, of course. It would be silly to argue otherwise.

7 However, it was brought in state court by the choice
8 of plaintiffs under, as your Honor is well aware, the
9 voluntary, involuntary doctrine, and we believe it should be
10 there at least until there's a pleading with claims or somebody
11 can say that's why it should be here or that's why it
12 shouldn't. Because we, and I don't -- I'm sorry, do you want
13 me to stop?

14 THE COURT: You can certainly finish your paragraph or
15 your sentence.

16 MR. OBERLANDER: Okay. I don't deny the right of
17 Mr. Sater or anyone to come in and remove under 1442 and claim
18 I'm a federal officer with a colorable defense. I claim the
19 right to examine that, and to request evidentiary, you know,
20 accelerated hearings on that, but I don't question his right to
21 allege it. I merely question his right to allege it with
22 respect to claims that I haven't made, and that's essentially
23 what the fight right now is about.

24 THE COURT: All right. Let's stop there because I was
25 just trying to get some background about what the case is

D7GPKRIC (3905)

1 about. So as I understand it, there is one motion before me
2 that I think is ripe, and that is plaintiff's motion for
3 reconsideration or, in the alternative, to remand regarding the
4 Kaminsky removal. And one question -- I don't believe I have
5 received any opposition to that. Is there any opposition to
6 it? Does anyone want to be heard with respect to the Kaminsky
7 removal?

8 Okay. I don't see any objection. The second question
9 I have is, does anyone, including plaintiff's counsel, have any
10 reason to believe that the discontinuance of Mr. Kaminsky,
11 which was filed on June 5th, 2013, was ineffective?

12 MR. OBERLANDER: May I?

13 THE COURT: Yes, you may.

14 MR. OBERLANDER: Not that it was ineffective, but it
15 should be part of the record. Technically, it is because it's
16 in some of their papers, but if we could make it part of the
17 transcript. On May 31 --

18 THE COURT: Also, just so you understand, there are a
19 lot of papers. So don't feel free to say something that's
20 already in the papers. I've looked at them, but I haven't
21 memorized them.

22 MR. OBERLANDER: On May 31, before we discontinued as
23 to Mr. Kaminsky, we discontinued as to the individual
24 defendant, Donald Trump Senior and as to Ivanka Trump, Trump
25 Enterprise Does, and a real estate investor named CIM. They

D7GPKRIC (3905)

1 were named only as declaratory defendants to establish
2 liability to them, but we discontinued in exactly the same
3 method.

4 So I would plea with the Court, to avoid problems with
5 them too, who will want to know exactly why they're not
6 discontinued, if we can establish as law of the case that this
7 dis- -- we don't claim Mr. Sater's removal was ineffective. We
8 believe he removed on June 21 and it's here.

9 THE COURT: Let's forget, again, about Mr. Sater for
10 just a minute. I want to focus on Mr. Kaminsky. So let's
11 finish with Mr. Kaminsky, and then we'll deal with the Trump
12 defendants.

13 With respect to Mr. Kaminsky, it appears that a notice
14 of discontinuance was filed on June 5th. It further appears
15 that a notice of removal was filed by Kaminsky on June 7th,
16 which, of course, is after June 5th. The jurisdiction of the
17 court with respect to removal was judged at the time of
18 removal. It appears that Mr. Kaminsky was no longer a party to
19 the action and, therefore, it appears that the removal was
20 ineffective.

21 So with respect to Mr. Kaminsky, just so it's clear, I
22 did dismiss Mr. Kaminsky because no one seemed to want him in
23 the action, including Mr. Kaminsky. Although, it appears on
24 closer inspection that Mr. Kaminsky was never before this court
25 and, therefore, that the removal by Mr. Kaminsky was

D7GPKRIC (3905)

1 ineffective. So I hope that answers your question,
2 Mr. Oberlander.

3 MR. OBERLANDER: Yes. Thank you, your Honor.

4 THE COURT: Okay. Now, that leaves us then, let's
5 talk about the Trump defendants because you addressed them. On
6 May 31st, before removal, plaintiffs filed a notice of partial
7 discontinuance as to defendants Donald Trump, Ivanka Trump and
8 Trump Does 1 through 100, as well as CIM Group; is that
9 correct, Mr. Oberlander?

10 MR. OBERLANDER: That is, yes.

11 THE COURT: They are still reflected on the docket; so
12 I am, unless there's any objection, going to dismiss those
13 defendants.

14 MR. OBERLANDER: No, thank you. They shouldn't be
15 here.

16 THE COURT: Okay. So we've dealt with Mr. Kaminsky,
17 and we've dealt with the Trump defendants, as well as CIM
18 Group. That leaves us with the motion -- the contemplated
19 motion to remand based on the Sater removal. And let me ask,
20 we have counsel for Mr. Sater here, do you intend to oppose
21 that motion?

22 MR. LISTON: Yes, your Honor.

23 THE COURT: Okay. So I will take papers on it. I'll
24 set a briefing schedule, but I would like to briefly hear from
25 both parties with respect to the motion. So why don't I hear,

D7GPKRIC (3905)

1 first, for counsel from Sater very briefly what the basis of
2 removal was, and then I'll hear from the plaintiff about the
3 basis for the remand argument.

4 MR. LISTON: Thank you, your Honor. Joshua Liston for
5 Mr. Sater. We removed the case under 28 U.S.C. 1442(a)(1), the
6 federal officer removal statute. To us, it seems readily
7 ascertainable from the face, with the summons of notice that
8 the basis for the claims against Mr. Sater is the fact of his
9 conviction and cooperation with the government.

10 In our view, because of various orders of prior courts
11 and also directives from agents of the federal government, that
12 that raises in our mind colorable federal defenses to those
13 claims and, thus, it's appropriate to remove under the federal
14 officer removal statute.

15 THE COURT: Okay. Thank you. I'll hear from
16 Mr. Oberlander, if you'd like to speak.

17 MR. OBERLANDER: As a matter of substantive and
18 procedural, I agree with my colleague. Here is the issue. If
19 that were a AUSA who, representing Mr. Kaminsky explaining
20 removal, we would have -- hypothetically, we would have an AUSA
21 clearly being sued for things that facially likely happened in
22 the context of litigation. Nobody would question that he was a
23 federal officer. The only question would be whether he has a
24 colorable defense.

25 This is not an immunity issue. The immunity issue

D7GPKRIC (3905)

1 would run to whether or not he would be liable, but in terms of
2 removal the question would be, did he act in the scope of
3 office? And that's a very broad test, and it's very hard to
4 win that. And then the next question would be, does he have a
5 colorable defense?

6 When you are dealing with somebody who doesn't walk
7 around with the halo of officership, for example, with the
8 government contractor, which is the way you typically see
9 these, and somebody comes in, for want of a better term, I'm a
10 de facto federal officer because I was drafted into service by
11 contract or something or some other deal whereby I was legally
12 required to follow extraordinarily direct, precise
13 instructions, then there's a federal issue of is that even
14 true.

15 I don't mean are they suborning, perjuring and lying
16 on facts. I mean, is it even true that there was such a
17 relationship and that he wasn't free to do as he wished. The
18 reason I use the government contractor issue is that, on the
19 issue of cooperators at the federal Appellate level, in my
20 research to date I found exactly one case. It's out in the
21 midwest. They don't have webbed feet there. It's not a Second
22 Circuit case.

23 THE COURT: Just say that again. The acoustics are
24 bad. You found one case and it's --

25 MR. OBERLANDER: I said the reason that I'm

D7GPKRIC (3905)

1 analogizing this to a federal contract issue --

2 THE COURT: I understand. Is that you found one case
3 involving a cooperator.

4 MR. OBERLANDER: Is there's exactly one case reported
5 in modern times on the federal officer defense of a cooperator
6 who ever -- who got himself sued civilly, and it got to
7 Appellate case and it says the same thing I'm saying --

8 THE COURT: What court is it?

9 MR. OBERLANDER: The Eighth.

10 THE COURT: Eighth Circuit?

11 MR. OBERLANDER: Yes, but the Eighth Circuit decision
12 is one word. It says affirmed. It's the District Court where
13 the reasoning is, and what the District Court was faced with
14 was basically somebody who got swept up in a sting operation
15 and the Feds had said to their cooperator, go wear a wire and
16 try to get all of these people to buy drugs, or whatever the
17 predicate offense was. And somebody was caught in that, and
18 sued the cooperator, claiming that he had no right to implicate
19 them, and that it was malicious and so on and so forth.

20 And what the District Court said, highly summarized,
21 is that when a federal officer lawfully is controlling an
22 informant or cooperator and has them wearing a wire to set up a
23 sting, then for that purpose, they may very well be federal
24 officers. Nobody's questioning that direct control of a
25 cooperator or an informant can make you a federal officer.

D7GPKRIC (3905)

1 The question is then, if that's the case, what's the
2 scope of the duty? What were you told to do? And so to go
3 back -- because that didn't come up in that case, to go back to
4 the contractor cases, for some reason -- am I going too fast
5 for you?

6 THE REPORTER: No, you're fine.

7 MR. OBERLANDER: Okay. For some reason the Second
8 Circuit attracts the bulk, even more than the Ninth, of all of
9 the contractor cases probably because of World War II and the
10 shipyards and in all of those cases they keep coming up with
11 asbestos. In all of those cases, they tend to circle around to
12 some plaintiff suing the contractor claiming you did something,
13 manufactured something, it hurt me, and you should have warned
14 me. And under state law, there was a duty to warn.

15 That, we believe, is reasonably analogous to if
16 Mr. Sater sells an investment to somebody in his company as a
17 security, under state and federal law, he has an affirmative
18 duty to disclose the prior conviction. It's similar to an
19 affirmative duty to warn about a dangerous product. And in
20 every single one of those cases in the Second Circuit, which is
21 notoriously strict, in order for the defendant, that is the
22 removing contractor, to claim 1442 successfully, they must
23 establish that the government exercised such direct control
24 over the content, time, place and manner of the warning, that
25 they had absolutely no discretion in the matter.

D7GPKRIC (3905)

1 So to summarize all of this, if the government had
2 said to Mr. Sater, hypothetically, because I really don't know
3 what he did as a cooperator, I haven't ever asked anybody what
4 he did, but if the government said to Mr. Sater, would you
5 please wear a wire and gather evidence on these people, pretty
6 much what he would have done doing that, we don't disagree, is
7 within the purview of 1442.

8 If the government said in its cooperation agreement,
9 which it did, Mr. Sater, you are not to disclose the existence
10 of your cooperation without our permission. And if somebody
11 argued that meant he shouldn't disclose the conviction, okay,
12 even given all of that, nobody said he should go out and sell
13 securities or take a job where he is put in a position where he
14 has to affirmatively disclose what he's been told not to
15 disclose.

16 The example I gave was that, in 2003, Mr. Sater leased
17 a house from a woman named Elizabeth Theriot. This is all
18 public. It's in litigation papers out there when he didn't pay
19 the rent, and I have no reason to believe that Elizabeth
20 Theriot, and we can call and ask, bothered to ask him on a
21 lease application, do you happen to have any hidden convictions
22 we want to know about. I don't think he had a duty to disclose
23 anything to her and, therefore, that would be a perfect example
24 of a transaction in which this case isn't implicated.

25 But within a day of that lease he also sold her a

D7GPKRIC (3905)

1 million dollars' worth of investments and membership interests
2 in BayRock Ocean Club, one of the BayRock companies. And when
3 he did so, pursuant to a private placing memorandum -- and his
4 signature is all over this stuff, along with Tevfik Arif's --
5 that triggered an obligation to disclose the prior conviction.
6 That's a wrongful concealment.

7 Concealing it from Theriott as his landlady wasn't
8 wrongful. Concealing it from her as his investor was.
9 Concealing it from banks was. He knows that, himself, because
10 his sentencing transcript, which is now public, has him
11 allocuting and saying, I did a pretty good job at things at
12 BayRock, built it up with my own two hands until New York Times
13 outed me, and once everybody knew that I had a connection to
14 organized crime the banks would never lend any money.

15 There's really no question about this. So for
16 Mr. Sater to claim, A, federal officer status and, B, duty and,
17 C, defense particularly sovereign immunity, what he has to do
18 is take the claims that we haven't written yet and say, okay,
19 when I sold that stock to Elizabeth Theriott, I was under
20 orders not only not to disclose my conviction but to not
21 disclose it in that transaction. Because nobody told him go
22 out there and sell stock. Unless he wants to bring an FBI
23 handler in here to say, we told Mr. Sater to go out and sell
24 securities. We told him to own 68 percent of a company that he
25 admits he built with his own two hands --

D7GPKRIC (3905)

1 THE COURT: Okay. I'm going to interrupt you right
2 there for just a moment. So I get the gist of what your
3 argument is. And I guess I have a little --

4 MR. OBERLANDER: Prematurity, the argument is
5 prematurity.

6 THE COURT: Well, the argument is prematurity?

7 MR. OBERLANDER: No. Until we write claims, how can
8 he possibly prove he's a federal officer even at a
9 preponderance level to make the removal colorable? And then
10 once we write claims, we're positive he can't do it. But right
11 now, it would be intellectually dishonest to say anything other
12 than that. We haven't claimed anything. I'm not trying to be
13 funny. We wrote a summons with notice to be able to serve a
14 place --

15 THE COURT: I understand. There's no complaint.

16 MR. OBERLANDER: Yes.

17 THE COURT: So what -- I'm just curious, what is your
18 plan with regard to the complaint?

19 MR. OBERLANDER: Well, what we would recommend is that
20 the Court -- we would be perfectly happy to waive any requested
21 attorney's fees and concede the removal was in good faith. And
22 if the Court remanded, we would stipulate to produce a
23 complaint in the State court action within 20, 30 days, I
24 assume.

25 It's not going to be very difficult. And at that

D7GPKRIC (3905)

1 point, Mr. Sater is free to remove and bring the argument when
2 he can intelligently say -- and I say intelligently, as in
3 intelligently ascertain, hot to impugn anybody, that's the
4 standard -- you see, with respect to that claim here's my
5 defense, on this day, this guy and this government told me go
6 do that and, therefore, I have a defense. We're requesting a
7 removal.

8 THE COURT: Okay. I got it. I got it. So let me
9 just talk to Mr. Liston for a minute. It's Mr. Liston, right?

10 MR. LISTON: Yes, your Honor.

11 THE COURT: So we've all been sitting here hearing
12 what Mr. Oberlander says, and is often the case, when you hear
13 one side, it sounds reasonable. So he's arguing that the case
14 should be remanded because without a complaint, it's very
15 difficult to assess all sorts of things, like one large thing
16 is just the existence of a federal question. There conceivably
17 could be a federal question, but the other has to do with the
18 role of your client with respect to various transactions.

19 I must say that, even though I just got this case, I'm
20 very frustrated that it seems very hard to move forward, and it
21 seems to me if we have a round of briefing on the remand
22 motion, where he makes what seems a logical argument that it
23 would be premature, it just kind of prolongs the inevitable,
24 which is the ultimate filing of a complaint, and then another
25 removal, and then another argument on remand. So what are your

D7GPKRIC (3905)

1 thoughts about that?

2 MR. LISTON: Sure, your Honor. Thank you. Just a
3 couple of points. First, on whether it's premature. I think
4 both sides recognize that for purposes of removal, a summons
5 with notice is a document that is capable of leading to
6 removal.

7 So the real question is under the Second Circuit
8 standard, Whitacre and other cases, is this document one where
9 one can readily ascertain the factual basis for removal. And
10 many times a summons with notice will give the absolute bear
11 minimum, will name, you know, a type of claim that one may
12 bring, and the defendant is to piece it together and have some
13 idea of what the case will be like.

14 The summons and notice is not nearly as vague as
15 Mr. Oberlander suggests. There's quite a bit of detail here.
16 There's, obviously, as we talked about in the citations to
17 Mr. Sater's conviction, there is reference to certain federal
18 litigations, docket numbers in which they're saying that there
19 is wrongdoing to occur.

20 So there is much more there than they suggest, and it
21 may be that now that we have removed the case, they are
22 thinking better of whether it was wise to put in sufficient
23 information, but because they did give us, in our view, a basis
24 to remove the case, that's -- that means that would need to be
25 adjudicated. We need to deal with the pleading that they've

D7GPKRIC(3905)

1 actually put out there.

2 THE COURT: Or the paper that is actually out there.

3 MR. LISTON: Sure. But we agree, as a procedural
4 matter, that if this case were to stay here, that they are -- I
5 mean, we can work this out. The timing, to the extent that I
6 could hear because of the acoustics, seemed okay. We certainly
7 have no objection to their taking the remaining time that they
8 would have under the state court rules to file a complaint.

9 But federal officer removal statute is different than
10 most removal statutes because the courts have made very clear
11 that, unlike most removal provisions, this one is to be
12 interpreted broadly because of the important stakes at issue.

13 THE COURT: Okay. So let me ask Mr. Oberlander. Why
14 not file a complaint so that we can fully address the remand
15 issue once, and if it belongs in state court, let it go to
16 state court?

17 MR. OBERLANDER: We're operating in an area now where
18 we are, all of us, with respect even including the Court, are
19 kind of charting our own way, and to the extent it's
20 reasonable, I represent my clients reasonably. If I can
21 briefly take a minute, I'm going to kind of agree, as long as
22 we can agree on something to protect my clients.

23 THE COURT: Okay.

24 MR. OBERLANDER: With one exception, it is absolutely
25 black letter certainty that it is -- and I'm sorry, but that's

D7GPKRIC (3905)

1 the correct word. It is improper for a court to look at
2 anything subsequent to the document in existence at the time of
3 removal.

4 Now, that doesn't mean that we all can't agree to do
5 it, I suppose, but the exception doesn't apply here. The
6 exception is where somebody commits a fraudulent joinder to
7 defeat diversity. All right? Otherwise, we're stuck with what
8 I wrote. And if there's a way to agree that works procedurally
9 and doesn't forfeit or waive any of my client's rights and gets
10 us all to move the case forward, I would agree.

11 But I have a question, since you're the one with the
12 robe, if you'll forgive me -- What? Okay. My colleague wants
13 me to point out that there are 25 other defendants capable of
14 also making individual removals, and that another reason to
15 remand, let the complaint get filed and serve everybody is so
16 that that way the moment -- and I promise I can serve everybody
17 in two days. That way, we're dealing with the last served, in
18 terms of timing.

19 If the Court is concerned about timing, an immediate
20 remand, the stipulated complaint, stipulated immediate service
21 of it would eliminate the possibility of, we're done, it goes
22 back, and then another defendant comes in. It seems to me
23 efficiency would be served by remanding back there and serving
24 and letting everybody remove or not within the same 30-day time
25 frame, but I'm sorry if I confused the Court. I didn't mean to

D7GPKRIC(3905)

1 get off that tangent.

2 Everything Mr. Sater said, through counsel, is correct
3 with one exception. Federal officer removal is construed
4 broadly as to the colorability of the defense that he claims,
5 and it's construed broadly to a degree as to his claim that he
6 did whatever he did in the scope of duty. There's no case that
7 holds it's construed broadly to determine whether he's a
8 federal officer, and it couldn't be because, otherwise,
9 everybody and his brother could simply say, the government told
10 me to do this. In other words, common reason would have to
11 hold that while if Mr. Sater can establish that he --

12 THE COURT: I'm sorry, I'm just going to interrupt
13 because I felt like we might be talking about how to make
14 progress, and now, I feel like we're not talking about that
15 anymore.

16 MR. OBERLANDER: The progress would be if I write a
17 complaint, which I can do within 20 days no matter what court
18 it's in, although there are different pleading standards, and
19 the complaint makes no claims against Mr. Sater for which he
20 would have a federal officer defense, I'm perfectly happy to do
21 that, as long as the Court can advise what the procedure will
22 be after that.

23 Because would the Court then say that this makes clear
24 that under the interests of justice, I'll be remanding even if
25 they're -- in other words, how would the Court proceed? I just

D7GPKRIC (3905)

1 don't want to agree to do something and have my client get mad
2 at me that we forfeited the right to request removal.

3 THE COURT: It's very hard for me to tell you in the
4 abstract how I would rule. I think I understand what you're
5 asking, which is whether I would try to exercise supplemental
6 jurisdiction over these claims, and the answer is, I'm not
7 sure. On the one hand, it seems like it would be efficient to
8 litigate all of this together.

9 On the other hand, I must also say there's nothing
10 particularly inviting about these cases that I've just
11 inherited. So I can only tell you that -- well, this is
12 perhaps a non sequitur, perhaps not, but if there is no federal
13 jurisdiction, I will be the first to say that I don't want the
14 case in front of me because I agree with the statement in one
15 of your letters that's it's grossly inefficient. Whatever I do
16 about jurisdiction is a nullity, and jurisdiction is one of the
17 things I care about first and foremost.

18 MR. OBERLANDER: Then perhaps a stipulation unless of
19 a complaint that there will be no claims alleged on remand that
20 say anything other than the following. Why don't I just write
21 the claims against Mr. Sater and stipulate into Court that no
22 other claims than these will be raised on remand? Wouldn't
23 that do it?

24 THE COURT: I don't know. Maybe it would. I'm going
25 to hear from other counsel. Thank you.

D7GPKRIC (3905)

1 MR. SAURACK: Your Honor, as a friend of the Court, as
2 far as efficiency, there's another issue here. That is, our
3 allegation is that our privileged documents were taken and used
4 in the 2010 case. The allegations in this new complaint sound
5 awful familiar. My concern is that state court case is based
6 upon the same documents that were taken will have an
7 inefficiency. We'll have a case before the state court and
8 sealing litigating the exact same thing on a dual track; so
9 that's the concern that we have here, your Honor.

10 MR. OBERLANDER: Which is a fair concern that's
11 addressed by the doctrine of abstention, which directs that in
12 such -- not only does it happen all the time that the court of
13 limited jurisdiction, would abstain until the state court
14 disposes of it. But if there's a definition of prematurity,
15 this would be it, to have a summons with notice and have
16 counsel argue that somehow we violated property laws of the
17 State of New York by introducing stolen trade secrets into
18 claims that don't exist yet, I think, would be the definition
19 of premature.

20 THE COURT: I think what we're all trying to do is
21 just -- I hope what we're all trying to do is find a way
22 forward here rather than being mired in what we seem to have
23 been mired in for years. So I am open to all suggestions about
24 how to get the case moving so we don't just have multiple
25 rounds of motion practice and cases on a dual track.

D7GPKRIC (3905)

1 Mr. Liston, do you have any views on this?

2 MR. LISTON: Your Honor, I mean, you know, I think
3 where we come out is I think the best way to achieve those
4 goals is to have Mr. Oberlander file the remand motion and
5 decide that. Because I think -- and I share the Court's
6 concern of having multiplicity of cases and different
7 pleadings, but I do think under the rules here, the most
8 straightforward way is to deal with this.

9 Because even if we have properly removed the case,
10 then what happens subsequently will not affect the Court's
11 power to adjudicate because we are working off the pleading
12 that they crafted and put there. Now, maybe they didn't mean
13 to include so much so that we could remove under the federal
14 officer removal statute but, obviously, in our view, that's
15 where we are.

16 THE COURT: Well, and sooner or later plaintiffs have
17 to file their claims.

18 MR. OBERLANDER: Sure.

19 THE COURT: And then, at some point, it will be
20 evident whether or not there's a federal jurisdiction. So,
21 Mr. Oberlander, I'll give you the last word and then I'm about
22 to proceed in the way that Mr. Liston suggested.

23 MR. OBERLANDER: The last word is that the removal
24 statute is exquisitely clear, which is, that the federal
25 officer to whom the claim is directed may remove. Okay?

D7GPKRIC(3905)

1 Now, I wrote those, and with respect to my colleague,
2 I don't kind of accidentally say more than I meant to say. I
3 meant to say what I said, and what I said in there is that we
4 intend to pursue direct and vicarious liability. As a very
5 simple example, we can prove what we will be alleging either
6 way, that people at BayRock, who are not Mr. Sater but who knew
7 about the concealment, took advantage of it to defraud people
8 of millions of dollars.

9 That's a lawsuit against those people, like Julius
10 Schwartz, and he's not represented by anybody in here based on
11 their identification. So this is only an allegation, but the
12 point is, a lawsuit against Julius Schwartz claiming that he
13 took advantage of the concealment of Sater's conviction to
14 defraud people by using BayRock to borrow billions of dollars
15 and not disclose it, does not implicate a federal defense
16 because the federal defense is personal to the federal officer.

17 Mr. Schwartz can come in and argue, you know what, I
18 was a federal officer, somebody ordered me to go in and defraud
19 the banks, but unless he does, Mr. Sater cannot remove because
20 I sue Mr. Schwartz. So when he says it says in there vicarious
21 indirect liability, absolutely it does. And vicariously, it
22 means that if, in the context of the litigation in the last
23 several years one of Mr. Sater's lawyers, for argument's sake
24 let's say it's Kelly Moore, because it was Kelly Moore who
25 wrote to Judge Glasser in a document that's now public, and

D7GPKRIC (3905)

1 said, don't worry, we've contacted all the counsels that have a
2 copy of Mr. Oberlander's complaint and they've agreed to
3 destroy all the records of it so no one will know this existed,
4 and we wish to sue her, and Mr. Sater becomes vicariously
5 liable. She doesn't have a federal officer defense and neither
6 does he in a vicarious liability.

7 Sure, I wrote those statements because they're crafted
8 to say direct and vicarious liability against those
9 responsible. There's not one sentence with a noun and a verb
10 that says we're going to sue Mr. Sater for this. That's why
11 it's premature and can't be adjudicated.

12 THE COURT: Okay. So I am going to set a briefing
13 schedule. So the remand motion, how soon can you file that?

14 MR. OBERLANDER: Could you give me two seconds?

15 THE COURT: Sure.

16 MR. OBERLANDER: My colleague here points out, I
17 believe, on removal here, the 120 days -- it's Rule 40 that has
18 the 120 days; isn't it?

19 THE COURT: Oh, you only have about a week left to
20 file.

21 MR. OBERLANDER: No, it was May 10th. It would run
22 until September 10th.

23 THE COURT: Okay.

24 MR. OBERLANDER: I filed that case on May 10th in
25 state Supreme Court. It should keep the same filing date on

D7GPKRIC (3905)

1 removal. So let's do it relatively quickly. Why don't we have
2 removal -- I can be done in two weeks.

3 THE COURT: Okay. So that is July 30th.

4 MR. OBERLANDER: Sure.

5 THE COURT: And two weeks for the response?

6 MR. LISTON: Yes, your Honor.

7 THE COURT: So that would be August 13th. Reply about
8 a week later, August 20th.

9 MR. OBERLANDER: Sure.

10 THE COURT: Okay. All right. So is there anything
11 else that we need to deal with? So the motion for
12 reconsideration, or to remand, I'm simply going to deny, but I
13 will clarify. I have clarified my order on the record and --
14 Yes?

15 MR. OBERLANDER: I apologize, but just to keep the
16 record clear, the only motion in front of you to remand was as
17 to Mr. Kaminsky.

18 THE COURT: Yes, yes.

19 MR. OBERLANDER: And that one you didn't deny -- I'm
20 sorry, you're denying as to the remand, but you're ruling --

21 THE COURT: I'm denying as to the remand because it's
22 moot.

23 MR. OBERLANDER: But you're ruling as to law of the
24 case that he was never here.

25 THE COURT: That is my observation, and I'm going to

D7GPKRIC (3905)

1 deny -- I have to grant or deny these motions or they stay on
2 the docket sheet forever. So I'm denying the motion for
3 reconsideration, but I will clarify.

4 MR. OBERLANDER: May I ask a simple question --

5 THE COURT: Yes.

6 MR. OBERLANDER: -- on the coming motion? So we don't
7 waste time on the motion practice, it is our position --

8 THE COURT: This is the Sater motion?

9 MR. OBERLANDER: Yeah, the one that we just did the
10 schedule to. It's our position that Mr. Sater must introduce
11 evidence to establish the federal officer defense other than
12 legal allegations of his counsel.

13 Now, it would seem an awful waste of time if he didn't
14 do it, and then we said, well, now you can't grant it. There's
15 no evidence, and then he got a do over. And we're not
16 questioning his good faith or bad faith. Could the Court
17 possibly considering ruling in advance that he would have to
18 produce some type of evidence to be able to have a threshold
19 showing of officer. Otherwise, how would we ever get anywhere?

20 THE COURT: I mean, I can't do that without knowing
21 what he would give me and whether it would be adequate. I
22 would simply urge Mr. Liston to do whatever you're going to do
23 in the way that looks like it would be efficient.

24 I did see in Mr. Oberlander's letter certain questions
25 about taking discovery and trying to get more information about

D7GPKRIC (3905)

1 Mr. Sater, which seems to be a recurring theme here. So to the
2 extent that you can put in whatever is necessary from an
3 evidentiary or other point of view, that would be appreciated.
4 Okay? All right.

5 So is there anything else we need to deal with in 13
6 CV 3905?

7 MR. OBERLANDER: I'm sorry.

8 THE COURT: Yes, Mr. Oberlander.

9 MR. OBERLANDER: Your local rules on motion practice
10 have caused disagreement among counsels. I have a question for
11 clarification.

12 THE COURT: Okay. I'm happy to address it.

13 MR. OBERLANDER: Are the -- Is that test program for
14 complex cases, did it naturally a month ago? It was supposed
15 to be for 18 months. I can't find any information.

16 THE COURT: I think it's still alive.

17 MR. OBERLANDER: Okay.

18 THE COURT: But I'm not positive either.

19 MR. OBERLANDER: The reason I ask is that, according
20 to -- cases get assigned to it or not based on the ECF code.

21 THE COURT: Correct.

22 MR. OBERLANDER: So there's only room for one ECF code
23 on the cover sheet; so when you bring a derivative action in
24 RICO and you write down RICO, it doesn't become complex, but if
25 you write down derivative, then it does.

D7GPKRIC (3905)

1 In the rules for the complex procedures, the rule for
2 pre-motion conferencing and letters is a syllable accurate
3 duplicate of your Honor's rules. However, there's an extra
4 rule in there that says, notwithstanding the preceding
5 paragraphs, I'm going from memory, in the event that a deadline
6 for making a motion is prescribed by rule or statute, such as
7 Rule 59, Rule 60, then the above requirements don't apply.

8 I'm asking your Honor for clarification because it has
9 come up in arguments with counsel that where we have, for
10 example, by law, by statute non-extent, a 30-day deadline to do
11 this or 20-day to do that, if we go ahead in good faith and try
12 to comply with the pre-motion conferencing letters, it
13 foreshortens that period immensely to the point where we can't
14 even formulate all our arguments and they get mad later saying,
15 oh, that's a new argument.

16 THE COURT: Well, one of the things you'll notice is
17 there are certain kinds of motions that are exempt from
18 pre-motion letters and pre-motion conference. Motions to
19 remand, as I recall, are one of them. So if that's the
20 particular one you're worried about, then don't worry about it.
21 And besides which, we're having this conference right here and
22 now.

23 If there is something else that is unclear, rather
24 than guess or try to, you know, play a game of gotcha, which I
25 think is not good for any of us, best to write just a very

D7GPKRIC (3905)

1 short, simple letter, perhaps one paragraph, to the Court
2 saying, should the rule be interpreted this way or that way?
3 And that way none of us is surprised. I don't want to be
4 surprised either.

5 MR. OBERLANDER: It was just a general question
6 because there are so many rules, rules that you would never
7 know that say you can't attach an affidavit. When Mr. Saurack
8 over there just filed a motion for opposition to a motion to
9 reconsider, which according to the local rules, actually your
10 rules --

11 THE COURT: My rules say it's not necessary, but
12 actually, I appreciated having that particular one. So if
13 there's a question about a rule, just ask. I think that's
14 maybe the simplest thing, and I will always docket the letter
15 with the question and whatever the clarification is, usually
16 will be an endorsement on the letter. That way, everyone will
17 know what it is. Okay. So let's move onto the next case and
18 why don't we take the oldest case now. Why don't we take 10
19 sieve 3959. Okay.

20 (Adjourned)